

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Amendment to the Commission's Rules)	WT Docket No. 95-157
Regarding a Plan for Sharing)	RM-8643
the Costs of Microwave Relocation)	

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**COMMENTS OF
THE PERSONAL COMMUNICATIONS INDUSTRY ASSOCIATION**

The Personal Communications Industry Association ("PCIA") hereby submits its comments in response to the Further Notice of Proposed Rulemaking issued in the above-captioned proceeding.¹ PCIA supports the Commission's proposal to shorten the voluntary negotiation period for D, E, and F block PCS licensees and believes that the Commission should also extend this modification to C block PCS licensees. Indeed, PCIA urges the Commission to go further and consider the elimination of the voluntary period completely for the C - F blocks. As shown below, the voluntary period serves no beneficial purpose and will merely delay implementation of PCS in this spectrum.

The FCC also proposes to allow microwave incumbents to participate in the cost sharing plan. Although PCIA is willing to consider this in principle, the Commission has not yet explained how it will deal with the absence of a negotiated check on the cost and comparability of an incumbent's self-engineered replacement system. These significant issues must be resolved before the agency's proposal can be implemented.

¹ First Report and Order and Further Notice of Proposed Rulemaking, WT Docket No. 95-157 (Apr. 25, 1996)(hereinafter "First Report and Order").

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I. THE FCC SHOULD ELIMINATE OR, AT A MINIMUM, SHORTEN THE VOLUNTARY NEGOTIATION PERIOD FOR C, D, E AND F BLOCK PCS LICENSEES.

In its pleadings in this docket, PCIA detailed the problems that have occurred as a result of the voluntary negotiation period established by the FCC for microwave relocations.² Although many negotiations and relocations are proceeding as anticipated by the Commission, a number of incumbent microwave licensees have taken advantage of this asserted moratorium on the FCC's traditional "good faith" obligations for licensees to demand four to five times the actual costs of relocation "as an inducement to consummate [a] negotiation in a timely manner."³ In addition, certain consultants and attorneys are charging incumbents significant sums for advice on how to extract premiums well beyond the costs of relocation from PCS licensees during the voluntary period. As PCIA has explained, these unreasonable demands are slowing the relocation process and, thus, the deployment of PCS. The Commission should, therefore, put an end to these practices as discussed below.

² See Comments of PCIA, WT Docket No. 95-157 at 2-8 (filed Nov. 30, 1995); Reply Comments of PCIA, WT Docket No. 95-157 at Appendix A (filed Jan. 11, 1996).

³ See Comments of PCIA, WT Docket No. 95-157 at Exhibit A (filed Nov. 30, 1995).

A. D, E, And F Block Licensees Face Even Greater Problems Than A And B Block Licensees Are Experiencing With The Voluntary Period.

The problems previously described by PCIA will be even more acute for D, E, and F block licensees. Because they have smaller license areas (BTAs rather than MTAs) and block sizes (10 MHz rather than 30 MHz), it will be more difficult for them to "engineer around" a microwave licensee who refuses reasonable offers for relocation. Entrepreneur licensees and other smaller companies will be faced with either paying huge relocation costs or delaying offering service. But, because they will need to begin service in order to generate cash flow to meet the installment payments on their licenses, such licensees will likely be forced to pay whatever an incumbent asks.

It follows that, as PCIA has stated, the voluntary negotiation period should be eliminated for these licensees and, indeed, for all PCS licensees. Incumbent microwave operators are guaranteed full cost compensation for comparable facilities and a seamless transition. The additional voluntary period affords them no material protection, it merely provides the opportunity to extract premiums above relocation costs for an "early" exit. There can be no justification for permitting, much less expressly authorizing, an FCC licensee *not* to bargain in good faith.

If the FCC nonetheless declines to eliminate the voluntary negotiation period entirely, PCIA believes that shortening it to one year will at least mitigate the pernicious impact of the problems that have been occurring. By reducing to one year the period before which the mandatory period and good faith negotiation requirement can be invoked, those incumbents

seeking to profit from the FCC's relocation rules will have less of an opportunity to do so. Thus, although the FCC elimination of the voluntary period remains the preferable solution, shortening it to one year would constitute an improvement over the current rules.

B. There Are Strong Public Policy Reasons For Extending The Elimination Or Shortening Of The Voluntary Negotiation Period To C Block Licensees.

C block licensees will be hurt the most by having to pay excessive premiums to relocate incumbents. C block licensees are entrepreneurs who in most cases will have fewer resources available than A and B block licensees, particularly considering the unexpectedly high bids for C block licenses. If these licensees face outrageous relocation demands in addition to high installment payments for their licenses, they may have severe financial difficulties. Since the purpose of the entrepreneurs' block is to encourage small business participation in PCS, it makes little sense to exclude them from this modification of the voluntary period since they will suffer severely from the problems it is causing.

II. SAFEGUARDS ENSURING OBJECTIVE CHECKS ON RELOCATION COSTS MUST BE IMPLEMENTED PRIOR TO MICROWAVE INCUMBENT PARTICIPATION IN THE COST SHARING PLAN.

The FCC has tentatively concluded that microwave incumbents should be allowed to participate in the cost sharing plan adopted in the First Report and Order. While in principle PCIA is willing to consider microwave participation in the cost sharing plan, it has grave concerns which must be addressed before the FCC decides this issue. PCIA has spent considerable time studying cost sharing issues and the Wireless Telecommunications Bureau

recently tentatively concluded that PCIA should be designated as the clearinghouse to administer the cost sharing plan.⁴ If the Commission determines that incumbents are eligible to participate in cost sharing, a PCIA clearinghouse will treat them in the same manner as any other relocating entity. As stated in its cost sharing plan,⁵ the clearinghouse will treat all parties fairly and will maintain strict neutrality. Microwave licensees will register any relocated links in the same way and will be entitled to be reimbursed up to the Commission's caps.

However, as the FCC has recognized, a number of problems will result if incumbents are allowed to relocate their own links unless appropriate safety mechanisms are developed. First, there will be no independent check on the comparability of the replacement system. Second, later PCS entrants will have no assurance that costs for the installation of the new system were fair. In addition, if incumbents are allowed to relocate their own links, they may be able to circumvent the negotiation process the FCC is relying on to minimize relocation costs. As described more fully below, to avoid these problems, the FCC must implement safety mechanisms before allowing incumbents to participate in cost sharing so as not to undermine the relocation process.

⁴ FCC Public Notice, "Wireless Telecommunications Bureau Solicits Business Plans from Parties Interested in Becoming the Clearinghouse that Will Administer the 2 GHz Relocation Cost-Sharing Plan," DA 96-647 (released Apr. 25, 1996).

⁵ PCIA Clearinghouse Plan, WT Docket No. 95-157 at 6,13 (filed May 24, 1996).

A. If An Incumbent Can Perform a Relocation By Itself, There Is No Assurance That The Incumbent Will Replace Its System With The Lowest-Cost Comparable System.

If an incumbent is allowed to relocate its own links, there is little incentive for an incumbent to minimize the cost of its replacement system. This so called "gold plating" problem will result because there is no PCS licensee negotiating with the incumbent. The FCC rules rely on a negotiation between an emerging technologies provider and an incumbent to provide a comparable microwave system at the lowest cost. In the absence of a PCS licensee on the other side of the negotiating table, there can be no confidence in the reasonableness of the relocation solution. Later-entrants will have to engage in a time-consuming process of verifying all expenditures for the relocation *ex post facto*.

In fact, an incumbent would be able to bypass the negotiation process completely by relocating its system and then filing with the clearinghouse, completely circumventing the FCC's extensive rules. Since an incumbent will in many cases know that a PCS licensee will need to relocate its system in order to begin service, it can relocate its own system and know that it will be reimbursed later. Thus, it may not have a strong incentive to search for the best possible costs on new equipment and towers. This is of great concern to PCS licensees because the costs of equipment and installation vary widely.

Moreover, by the time a later-PCS entrant is responsible for cost sharing, the original system will have been dismantled, and the PCS entrant will be unable to examine it and determine if the replacement system is actually comparable. For example, the FCC clarified in the First Report and Order that PCS licensees will only be required to provide incumbents

with throughput capacity sufficient to satisfy their needs at the time of relocation, rather than to match the overall capacity of the system in order prevent spectrum hoarding and promote the use of spectrum efficient technologies.⁶ If an incumbent relocates itself to a new system, it will be impossible to verify what the throughput usage was prior to relocation, and the later-PCS entrant will not be able to determine if the new system is comparable or an upgrade.

The reimbursement caps are not adequate to resolve these problems. Although the caps would limit incumbents to cost sharing reimbursement of \$250,000 plus \$150,000 for any new towers or tower modifications, the caps were set higher than what actual relocation costs will be in many cases. Thus, additional safeguards would be needed to ensure that an incumbent did not request relocation expenses of \$400,000 when a comparable system would have cost much less. Protections will also be necessary to prevent an incumbent who would have found it necessary to relocate or change its communications system for its own business reasons prior to the relocation by a PCS provider from seeking reimbursement. Under the current rules, if an incumbent no longer needs its microwave system or relocates to another band because it is in its best interests to do so, the incumbent receives no reimbursement. Participation in cost sharing should not change this outcome.

Yet another difficulty arises because the proximity standard will be used to determine cost sharing obligations. Under the current rules, a PCS provider must relocate an incumbent if PCS operations will cause harmful interference under the TIA Bulletin 10

⁶ First Report and Order at ¶ 29.

standard. Thus, a PCS provider that wants to avoid the costs of relocation can engineer its system around an incumbent so as to avoid causing interference and relocation of the incumbent. However, cost sharing obligations will be triggered by the proximity threshold, so an incumbent could relocate its own system and then demand reimbursement under the cost sharing rules when, in fact, the PCS provider would not have caused any interference to the incumbent's operations. If incumbents are to participate in cost sharing, the FCC must ensure that they cannot use the proximity threshold standard to obtain compensation they would not otherwise be entitled to under the relocation rules.

B. Without Safeguards, The Number And Complexity Of Cost Sharing Disputes Will Increase.

Because of problems discussed above, if proper safeguards are not implemented the participation of incumbents in cost sharing will cause numerous disputes between incumbents and PCS licensees. Later entrants who will owe cost sharing reimbursement will not have confidence that the relocation costs are reasonable due to the lack of negotiations. The disputes will be more difficult to resolve through mediation and arbitration because they will be taking the place of relocation negotiations which did not occur. This will increase the dispute resolution costs for the clearinghouse, and more disputes will likely require Commission intervention.

* * *

PCIA is unsure what safety mechanisms could be implemented to protect against the problems described above. PCIA intends to study the comments filed in this docket and

discuss this matter further with its members to determine if acceptable solutions can be found.

III. CONCLUSION

PCIA urges the Commission to eliminate or shorten the voluntary negotiation for the C, D, E, and F PCS blocks. Incumbents should always be required to negotiate in good faith because full cost reimbursement and comparable facilities are guaranteed by FCC rules. In addition, before allowing incumbent participation in the cost sharing plan, the FCC must develop appropriate safeguards to address the problems PCIA has identified herein.

Respectfully submitted,

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